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84-1247

Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VARTAN AZARIAN, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE DEFENDANT HAS BEEN DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL SINCE THERE WAS A REASONABLE LIKELIHOOD THAT AN APPELLATE COURT REMAND AND TRIAL COURT REHEARING OF THE DEFENDANT'S "NEWLY DISCOVERED EVIDENCE" WOULD HAVE AFFECTED THE JUDGMENT OF THE JURY.

II. WHETHER THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DEFENDANT'S CONVICTION SINCE 18 U.S.C. §472 REQUIRES THE FRAUDULENT INTENTIONAL PASSING OF COUNTERFEIT VOTES AND NO EVIDENCE OF THE DEFENDANT'S REQUISITE INTENT WAS INTRODUCED AT TRIAL.

TABLE OF CONTENTS

JURISDICTION..... 1

QUESTIONS PRESENTED.....1, 2

STATEMENT OF CASE AND FACTS..... 2

STATUTORY PROVISION INVOLVED..... 7

REASONS FOR GRANTING WRIT

I. THE DEFENDANT HAS BEEN DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL SINCE THERE WAS A REASONABLE LIKELIHOOD THAT AN APPELLATE COURT REMAND AND TRIAL COURT REHEARING OF THE DEFENDANT'S "NEWLY DISCOVERED EVIDENCE" WOULD HAVE AFFECTED THE JUDGMENT OF THE JURY... 8

II. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DEFENDANT'S CONVICTION SINCE 18 U.S.C. §472 REQUIRES THE FRAUDULENT INTENTIONAL PASSING OF COUNTERFEIT VOTES AND NO EVIDENCE OF THE DEFENDANT'S REQUISITE INTENT WAS INTRODUCED AT TRIAL..... 12

CONCLUSION..... 18

APPENDIX--

Judgment of the Court of Appeals.. 2a

Opinion of the Court of Appeals... 3a

Order Denying Petition for Rehearing..... 8a

TABLE OF AUTHORITIES

Cases:

Brady v. Maryland, 373 U.S. 83 (1963)..... 11

Casey v. United States, 522 F.2d 206 (5th Cir.), rehearing denied 525 F.2d 1407, two cases, cert. denied 96 S.Ct. 2233 (1975).... 8

Donnelley v. United States, 276 U.S. 505 (1927)..... 17

Fernandez v. United States, 329 F.2d 899, 9th Cir.) cert. denied 85 S.Ct. 62, 379 U.S. 832 (1964).. 9

Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1 (1956)..... 10

Napue v. Illinois, 360 U.S. 264, 79, S.Ct. 1173 (1959)..... 11

Schuylkill & Dauphin Improvement & Railroad Company v. Munson, 81 U.S. 442 (1871)..... 16

United States v. Azarian, No. 84-5028 (11th Cir. August 23, 1984).... 4

United States v. Curran, 465 F.2d 260 (7th Cir 1972)..... 8

United States v. Devoe, 493 F.2d 776 (5th Cir. 1974)..... 11

United States v. Haggins, 545 F.2d 1009 (5th Cir. 1977)..... 15

United States v. Miller, 277 F. Supp 200 (D. Conn. 1967).... 9

United States v. Perez, 698 F.2d 1168 (11th Cir. 1983)..... 15

United States v. Revel, 362 F. Supp 448 (M.D. Ala., E.D. 1973)..... 9

United States v. Rice, 652 F.2d 521 (5th Cir. 1981)..... 15

United States v. Sink, 586 F.2d 1041 (5th Cir. 1978)..... 15

United States v. Staller, 616 F.2d 1284 (5th Cir. 1980)..... 13

United States v. Steel, 458 F.2d 1164 (10th Cir. 1972)..... 9

United States v. Stone, 601 F.2d 800 (5th Cir. 1979)..... 13

United States v. Wilkerson, 469 F.2d 963 (5th Cir. 1972)..... 13

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution, Amendment XIV... 7

18 U.S.C. §472..... 12,14

JURISDICTION

A timely Petition for Rehearing to the Court of Appeals for the Eleventh Circuit was denied (without opinion) on July 5, 1984. The judgment of the court of appeals was entered on August 23, 1984. This petition is filed within the time period authorized by this Court. Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the Defendant has been denied his Due Process right to a fair trial since there was a reasonable likelihood that an appellate court remand and trial court rehearing of the Defendant's "newly discovered evidence" would have affected the judgment of the jury.

II. Whether the court of appeal erred in affirming the Defendant's conviction under 18 U.S.C. §472 when no evidence of the Defendant's intent was introduced at trial.

STATEMENT OF THE CASE AND FACTS

The Defendant, Vartan Azarian, was convicted in the Southern District Court of Florida for violations of 18 U.S.C. §§471, 472 and 473, falsely making, possessing and delivering Federal Reserve Notes.

Shortly thereafter, then counsel for the Defendant filed a timely Motion for New Trial. In it, he urged that the failure of the court to sever the five counts charged against the Defendant, and the resultant admissibility of irrelevant and prejudicial evidence caused irreparable injury. This motion as well as an accompanying Motion for Judgment of Acquittal

was denied.

The undersigned counsel appealed to the Eleventh Circuit Court of Appeal to stay the appellate proceedings based on "newly discovered evidence". The Defendant moved the appellate court to relinquish jurisdiction and permit the district court to hear a subsequent Motion to Set Aside Judgment. This motion was similarly denied.

The district court simultaneously denied the Defendant's Motion to Consider New Evidence.

The Eleventh Circuit Court of Appeals denied the Defendant's Petition for Rehearing on July 5, 1984, and affirmed his conviction in a per curiam opinion on August 23, 1984. (United

States v. Azarian, No. 84-5028) (11th Cir. August 23, 1984).

The facts clearly indicate that a Secret Service investigation of alleged counterfeiting activity revealed a number of counterfeit $100 (one hundred dollar) bills in Arizona and eventually in Florida. Arrests followed on the basis of this investigation. (Rec: Vol. 2, P. 35 & 96).

The American Express Company later contacted the Secret Service concerning counterfeit American Express checks. (Rec: Vol. 2, P. 100). Another party was arrested on this offense. One Secret Service agent concluded that the $100 bills and the $20 bills recovered in the separate incidents were not printed by the same manufacturer since some looked more real than others. (Rec: Vol. 6, P. 68).

The Government began investigations to explain this disparity. Arrangements

were made for a luncheon introduction between Undercover Agent Hackenberry and Defendant Azarian. Undercover Agent Hackenberry presented himself as being interested in acquiring counterfeit United States currency. (Rec: Vol. 3, P. 76). According to the testimony of the agent, it is normal procedure to obtain samples before purchasing larger quantities of counterfeit bills or notes. (Rec: Vol 3, P. 77).

After this meeting, Agent Hackenberry repeatedly contacted the Defendant regarding the possible exchange of counterfeit for genuine bills. After persistent calls and requests, the Secret Service agent finally received two $100 bills from the Defendant. Immediately thereafter, Defendant Azarian emphatically told the agent

"it was off, that he did not want to go through with it." (Record: Vol. 3 P. 174).

Defendant Azarian refused to meet with the agent again, despite the agent's persistent attempts to purchase the negatives, and repeated offers to send the Defendant to New York for printing opportunities.

At trial, the Government introduced expert testimony. The expert suggested that the same negatives recovered by the Secret Service were used to print both bills allegedly given to Hackenberry. At trial, the expert testified that fingerprints on one negative matched those of the Defendant Azarian.

New evidence, discovered after trial, indisputably proves a serious error in the expert testimony presented by the Government. Upon microscopic examination, an abnormality

appeared in the negative which should have produced a corresponding break in a line on the counterfeit bill. Defendant's expert Ernest Schmatolla, a renowned research consultant in graphic arts miscroscopy, concludes that the counterfeit bill was not produced from that negative, as the Government contended.

An analysis of the fingerprints on the negatives shows the fingerprint impressions were made at the time the negatives were developed. Examination of the prints by a fingerprint expert conclusively reveals that the prints do not belong to the Defendant.

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV:

> ... nor shall any State deprive any person of life, liberty or property, without due process of law.

REASONS FOR GRANTING WRIT

I. THE DEFENDANT HAS BEEN DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL SINCE THERE WAS A REASONABLE LIKELIHOOD THAT AN APPELLATE COURT REMAND AND A TRIAL COURT REHEARING OF THE DEFENDANT'S "NEWLY DISCOVERED EVIDENCE" WOULD HAVE AFFECTED THE JUDGMENT OF THE JURY.

The Fourteenth Amendment to the Constitution guarantees that no person shall be deprived of "life, liberty or property without due process of law." One of the guarantees of Due Process is the right to a fair trial. Courts have consistently held that a new trial should be granted on the grounds of "newly-discovered evidence" if consideration of the new evidence would probably bring about a different result. United States v. Curran, 465 F.2d 260 (7th Cir. 1972); Casey v. United States, 522 F.2d 206 (5th Cir.) rehearing denied 525 F.2d 1407, cert. denied 96 S.Ct.

2233 (1975); United States v. Steel, 458 F.2d 1164 (10th Cir. 1972); Fernandez v. United States, 329 F.2d 899 (9th Cir.); cert. denied 85 S.Ct. 62, 379 U.S. 832 (1964); United States v. Revel, 362 F. Supp 448 (M.D. Ala., E.D. 1973); United States v. Miller, 277 F. Supp 200 (D. Conn. 1967).

Defendant's newly discovered evidence relating to the negatives, irrefutably attacks the essence of the Government's case. This evidence shows that the counterfeit bill was not produced from the particular negative introduced into evidence against the Defendant in this case.

New expert testimony will also reveal that fingerprints found on the negative were made at the time of development. The Defendant asserts that further examination of the plates by a fingerprint expert conclusively

reveals that the prints do not belong to the Defendant.

This Court has held that a new trial should be granted where there has been post-trial discovery of a key witness' lack of credibility or perjury committed at trial. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1 (1956). There is strong reason to question the accuracy and truthfulness of the government's expert testimony. Accordingly, this Court should grant a new trial so that all the evidence may be fairly weighed and considered.

Since the new evidence directly refutes the Governments' evidence presented at trial, the jury has decided the case based on inaccurate and false testimony. This Court has held that a new trial is required if "false testimony could ... in any reasonable likelihood have affected the judgment of the

jury." Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959). Based on Napue, the Court of Appeals for the Fifth Circuit held that discovery by the defense of exculpatory developments, subsequent to trial, call into question the fairness of the earlier trial. United States v. DeVoe, 493 F.2d 776 (5th Cir. 1974). Quoting Mr. Justice Douglas in Brady v. Maryland, the DeVoe court said,

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly. 373 U.S. 83, at 87.

The court in DeVoe said that unfairness may have crept into the trial unexpectedly and should therefore be corrected in a new trial if the evidence was material to the outcome.

In the present case, trial counsel first learned of the Government's intended use of the plates during the trial itself. Accordingly he was unable to refute the testimony given by the Government expert. Therefore, the expert analysis which present counsel subsequently secured, was not made available to the jury for consideration. In essence, a jury was not afforded an opportunity to consider all the valid evidence now available.

II. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DEFENDANT'S CONVICTION SINCE 18 U.S.C. §472 REQUIRES THE FRAUDLENT INTENTIONAL PASSING OF COUNTERFEIT BILLS AND NO EVIDENCE OF THE DEFENDANT'S REQUISITE INTENT WAS INTRODUCED AT TRIAL.

The salient language of 18 U.S.C. §472 states:

> WHOEVER, WITH THE INTENT TO DEFRAUD, PASSES, UTTERS, PUBLISHES OR SELLS ... ANY FALSELY MADE, FORGED, COUNTERFEITED, OR ALTERED OBLIGATION OR OTHER SECURITY OF THE UNITED STATES .....

Courts have held that to prove a violation of this statute, the Government has the burden of proving that a Defendant passed or possessed counterfeit money, with the intent to defraud. United States v. Stone, 601 F.2d 800 (5th Cir. 1979); United States v. Staller, 616 F.2d 1284 (5th Cir. 1980).

There is precedent from the former Fifth Circuit on point. In United States v. Wilkerson, 459 F.2d 963 (5th Cir. 1972), the Appellant challenged charges of possession and transfer of counterfeit convictions arising out of the delivery of a sample note, on the grounds that all parties understood the sample was to be returned after inspection by the prospective buyer. Accordingly, no one could have possessed or

transferred the sample with the requisite intent to defraud.

The court in Wilkerson recognized that no one intended to defraud the prospective buyer because everyone knew he wanted to examine a specimen of the counterfeit product. Nor could delivery of the sample have been intended to defraud some unknown third party down the chain of distribution, because that chain was to stop with the prospective buyer's inspection. Wilkerson, supra at 969.

The language of 18 U.S.C. §472 is clear. "Whoever, with intent to defraud, passes..." (Emphasis added). The rationale adopted by the court in Wilkerson is similarly applicable to the case at bar.

The two sample notes received by Agent Hackenberry were for purposes of inspection only -- for "potential" future manufacturing. Unless the plain wording of the statute is to

be ignored, it must be recognized that the "requisite intent to defraud was absent from the transaction" in the instant case, as it was in Wilkerson.

The mere fact that the Defendant possessed the two (2) one hundred dollar notes transferred to Agent Hackenberry, does not establish the requisite intent to defraud. United States v. Perez, 698 F.2d 1168 (11th Cir. 1983); United States v. Haggins, 545 F. 2d 1009, 1013 (5th Cir. 1977). Rather, the Government must prove that the Defendant acted with the requisite intent to defraud. United States v. Rice, 652 F.2d 521, 526 (5th Cir. 1981); United States v. Sink, 586 F.2d 1041, 1049 (5th Cir. 1978).

There is no evidence that the Defendant had any intent to defraud by either transferring or merely possessing two counterfeit bills. There is no evidence in the

record that the Defendant has ever passed a counterfeit bill to any unsuspecting purchaser or that he intended to do so here.

The strongest evidence the Government has produced indicates the Defendant possessed and then transferred sample notes to Agent Hackenberry. The agent was the only person who came into possession of the sample bills. Agent Hackenberry knew the bills he was receiving were counterfeit. Defendant Azarian never agreed to make additional counterfeit bills. In fact, the Defendant refused to make such an agreement several times.

Since 1871, this Court has held that is it error for the trial court to submit a question to the jury where there is no evidence on the subject. Schuylkill & Dauphin Improvement & Railroad Company v. Munson, 81 U.S. 442, (1871).

In the instant case, no evidence of intent, an important element of the offense charged, was introduced by the Government. Therefore, it was error for the district court to submit the question of the Defendant's fraudulent intent to the jury.

The facts in this case mandate a new trial. A person may not be punished for a crime against the United States unless the facts show plainly and unmistakably that an offense within the plain meaning of an act of Congress has been committed. Donnelley v. United States, 276 U.S. 505 (1927).

Fraudulent intent is the seminal element of the offense charged in this case. The facts here utterly fail to indicate that the Defendant possessed the requisite intent when he gave the bills to Agent Hackenberry.

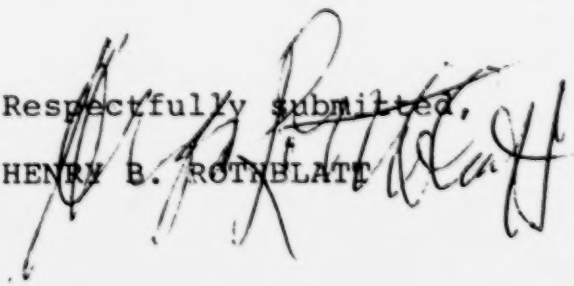
CONCLUSION

The Due Process Clause of the Fourteenth Amendment of our Constitution guarantees that all persons are entitled to a fair trial. New evidence, if heard, would have undoubtedly affected the outcome of the trial. This discovery of new evidence, critical to the defense and devastating to the Government's case, mandates that a new trial be granted.

The Government presented no evidence of Defendant's intent. There is nothing in the record to indicate that Defendant Azarian had the requisite intent to defraud as required by the statute. The trial court erred in submitting the question of intent to the jury.

For these reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



HENRY B. ROTHBLATT

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5028

Non-Argument Calendar

D.C. Docket No. 82-656-CR-WMH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VARTAN AZARIAN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before HATCHETT, ANDERSON and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Enerted: August 23, 1984

For the Court: Spencer D. Mercer

By: _____

/S/Deputy Clerk

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5028

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VARTAN AZARIAN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(August 23, 1984)

Before HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Appellant Azarian was convicted on all five counts of an indictment charging him with falsely making, possessing and delivering Federal Reserve Notes in violation of 18 U.S.C. §§ 471, 472 and 473.

In this appeal, appellant seeks a motion to remand the case to the district court so that there appellant may file a motion for new trial based upon newly discovered evidence. Appellant alleges that if he can obtain from the government Exhibits 7, 34 and 35, composites of the three sets of counterfeit notes admitted at trial, he can then have an expert examine the accuracy of the government's testimony. This would establish that the flaws in the three sets were not substantially the same, as had been

testified by the government expert at trial. In his brief, appellant asserts, "Based on information obtained post-trial, there is a strong possibility that perjured testimony of a government witness strongly influenced the guilty verdict." (Appellant's Brief at 10).

We refuse to remand for two reasons. Appellant does not state what information he has obtained post-trial that suggests that a government witness perjured himself. Additionally, appellant totally fails to meet any of the requirements of a motion for new trial based on newly discovered evidence. It is apparent that an examination of the government exhibits, and the negatives used in making the counterfeit money, was available to defendant at trial. The

very same evidence appellant now proposes to submit to the trial court upon remand is evidence that could have been presented at trial.

Appellant next claims that he was wrongfully convicted of an intent to defraud and relies upon United States v. Wilkerson, 469 F.2d 963 (5th Cir. 1972). It is true in that opinion that the court pointed out that Wilkerson could not be convicted of an intent to defraud since there was a clear understanding that the sample counterfeit money was to be returned to him after inspection by the prospective buyer. There is no evidence in this case that the undercover agent agreed to return the two $100 samples to Azarian. In fact, the government agent had previously advanced Azarian $200 and

Azarian had every reason to believe that the two $100 counterfeit bills would be passed to others. See United States v. Anzalone, 626 F.2d 239, 244 (2d Cir. 1980).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5028

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VARTAN AZARIAN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING

(November 7, 1984)

Before HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for hearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

/S/Thomas A. Clark

United States Circuit Judge

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